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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

In re D.N. et al., Persons Coming Under the
Juvenile Court Law.

FRESNO COUNTY DEPARTMENT OF
SOCIAL SERVICES,

Plaintiff and Respondent,

v.

D.N.,

Defendant and Appellant.

F072697

(Super. Ct. Nos. 15CEJ300171-2 &
15CEJ300171-3)

OPINION

THE COURT*

APPEAL from an order of the Superior Court of Fresno County. James Petrucelli,
Judge.

Konrad S. Lee, under appointment by the Court of Appeal, for Defendant and
Appellant.

Daniel C. Cederborg, County Counsel, and Brent C. Woodward, Deputy County
Counsel, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Gomes, J. and Detjen, J.

INTRODUCTION

D.N. is the father of two minor daughters, D.N. and K.N. Father appeals the juvenile court's disposition denying reunification services pursuant to Welfare and Institutions Code¹ section 361.5, subdivision (b)(6). Father contends substantial evidence does not support the section 361.5, subdivision (b)(6) finding and that he has preserved this issue for appeal. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

The social studies prepared in this case report that father has three felony and two misdemeanor convictions, including a felony conviction for involuntary manslaughter; mother has two misdemeanor convictions. Father has 20 children with different women.

Father inflicted serious physical harm on both his minor daughters by hitting them often with a belt, leaving marks and bruises. The minors reported that the marks and bruises hurt and would sting when they took a shower and water hit their skin. There was domestic violence in the home, with both verbal and physical altercations.

Father abused alcohol frequently, which often led to his physical and sexual abuse of his daughters. K.N. reported that father "drinks a lot and gets really drunk." While drunk, father kissed K.N. on the mouth and inserted his tongue in her mouth; he also put his hands under her shirt and fondled her breasts. This incident occurred in the front yard of the home and prompted a neighbor to call the police. As a result of this incident, father was arrested for violating Penal Code section 288, subdivision (a). An emergency protective order was issued in the criminal case, barring father from having any contact with K.N. or D.N.

Both D.N. and K.N. each reported that when father was drunk, he would crawl into their bed at night and "do things to" them. An adult sibling reported that father

¹ References to code sections are to the Welfare and Institutions Code unless otherwise specified.

molested her sexually when she was a minor. Both minors reported that when father was drunk, he would become angry and mean and they were scared of him.

The detention hearing was held on July 13, 2015. Father refused to be transported for the hearing and the juvenile court noted father did not want to come to any hearings. At the July 31, 2015, jurisdiction hearing, the juvenile court noted on the record that father declined to participate in or be transported for the hearing. In the report prepared for the initial disposition hearing, father denied any sexual or physical abuse and indicated he did not wish to participate in the case and would not appear in court on the case.

The Fresno County Department of Social Services (department) reported that the minor children were together in a foster home, were adjusted to their placement, and doing well. The department recommended that reunification be denied father, pursuant to section 361.5, subdivision (b)(6), because of his sexual conduct with his daughters and that the minors were fearful of father and did not want to return to his care.

The contested disposition hearing was set for November 6, 2015. At the October 28, 2015, hearing before the dispositional hearing, there was an exchange between father's counsel and the juvenile court regarding father's "Statement of Contested Issues." In his Statement of Contested Issues, father set forth four issues, including issue number (2), challenging the sufficiency of the evidence to sustain a section 361.5, subdivision (b)(6) finding; and issue number (4), asserting that "offering family reunification services are in the best interests of his daughters."

At the October 28, 2015 hearing, in response to a question from the juvenile court father's attorney stated, "Father is objecting to the bypass on services." Father's counsel also stated the issue as "services would be in the minors' best interest." The juvenile court then clarified the contested issues, "So, is it only issue number 4?" To which father's counsel responded, "Yes.... We proceed on only issue number 4."

The judicial officer had signed the disposition report prepared by the department, verifying that he had read and considered the contents of the report. The juvenile court noted at the disposition hearing that the disposition report had been reviewed and considered. The department submitted the disposition report and criminal protective orders into evidence. The juvenile court took judicial notice of the criminal protective orders.

Father presented testimony from two witnesses. Debbie Mejia, with whom father had a prior relationship, testified father did things a “normal father” would do. Tanisha Drum, with whom father was in a current relationship and with whom father had children, also testified father engaged in normal activities with his children. Drum testified D.N. and K.N. would benefit from a continuing relationship with their father because “they love their dad” and “if it wasn’t for him, they wouldn’t have the grades that they have.”

Counsel for the minors supported the department’s recommendation that services be denied. The minors were fearful of father and did not want to reunify. Minors’ counsel opined that reunification was not in the best interests of the minors. Counsel for mother also supported the department recommendation. Mother’s counsel noted that the criminal protective orders prohibiting contact between father and the minors were in effect, and opined there was no way for father to receive services and reunify in light of the criminal protective orders.

The juvenile court took judicial notice of the disposition report and the criminal protective orders. Reunification services were ordered for mother only and services were denied father pursuant to section 361.5, subdivision (b)(6). Father was informed of his right to appeal. No objection was raised by father to the failure to state an adequate basis for the section 361.5, subdivision (b)(6) finding. Father’s counsel did maintain that clear and convincing evidence did not support the finding.

The disposition order was filed November 6, 2015. Father filed a notice of appeal on November 9, 2015.

DISCUSSION

Father challenges the section 361.5, subdivision (b)(6) finding, contending clear and convincing evidence does not support the finding. He also contends he has preserved this issue for appeal. We conclude father failed to preserve this issue.

I. Waiver of Issue

At the October 28, 2015 hearing to determine the contested issues on which the department would need to present evidence, father's counsel specifically stated that father was contesting only one issue, "Yes.... We proceed on only issue number 4." Father's issue number (4), was that "offering family reunification services are in the best interests of his daughters."

In light of the representations and concessions at the October 28, 2015 hearing, we deem father to have waived this issue for purposes of appeal. The purpose of the October 28 hearing was to determine the contested issues upon which the parties would have to present evidence; father specifically stated he was not challenging a section 361.5, subdivision (b)(6) finding, but maintained that services would still be in the best interests of his minor daughters.

"In dependency litigation, nonjurisdictional issues must be the subject of objection or appropriate motions in the juvenile court; otherwise those arguments have been waived" and may not be raised on appeal. (*In re Christopher B.* (1996) 43 Cal.App.4th 551, 558.) Having specifically stated that he was not objecting to a section 361.5, subdivision (b)(6) finding, and to then maintain, at the end of the contested disposition hearing when the presentation of evidence had concluded, that he was now raising an objection to such a finding, essentially permits a party "to play fast and loose with the administration of justice by deliberately standing by without making an objection of which he is aware and thereby permitting the proceedings to go to a conclusion which he

may acquiesce in, if favorable, and which he may avoid, if not.” (*In re Riva M.* (1991) 235 Cal.App.3d 403, 411-412.)

When father’s counsel affirmatively stated that father was contesting the disposition only as to one issue, and specifically stated that father was not challenging the section 361.5, subdivision (b)(6) recommended finding, father permitted the proceedings to go to conclusion without additional evidence on that point. He cannot now contest the sufficiency of the evidence; his actions constitute a waiver of the issue for purposes of appeal. (*In re Riva M., supra*, 235 Cal.App.3d at pp. 411-412.)

II. Substantial Evidence

Regardless of father’s waiver of the issue, substantial evidence supported the juvenile court’s determination to deny reunification pursuant to section 361.5, subdivision (b)(6). The social study constitutes competent evidence and was admitted into evidence by the juvenile court. That social study noted that father had molested another of his children, now an adult; that both of his minor daughters reported inappropriate behavior by father; and that father had committed a lewd and lascivious act upon one daughter, for which he was charged with violating Penal Code section 288, subdivision (a).

While drunk, father kissed K.N. on the mouth and inserted his tongue in her mouth; he also put his hands under her shirt and fondled her breasts. This incident occurred in the front yard of the home and prompted a neighbor to call the police. This conduct is a violation of Penal Code section 288, subdivision (a), and constitutes a violent felony as defined in Penal Code section 667.5, subdivision (c)(6). The criminal protective orders were in effect and would not expire until October 19, 2018. The criminal protective orders precluded father from having any personal, electronic, telephonic, or written contact with either of his minor daughters; it also precluded him from being within 100 yards of either child.

While section 361.5, subdivision (b)(6) specifies certain offenses which constitute severe sexual abuse, it is not exhaustive and specifically states that “severe sexual abuse” is not limited to the enumerated offenses. The code section also permits a juvenile court to take into account sexual abuse of siblings and half-siblings. Here, father had sexually abused his adult daughter when she was a minor; sexually abused K.N. by committing lewd and lascivious acts upon her in a public setting, the front yard; and both K.N. and D.N. reported that when father was drunk, he would crawl into their bed at night and “do things to” them.

The juvenile court could reasonably find that evidence that father acted inappropriately sexually with at least three of his female children; and committed an act against K.N. that was a violation of Penal Code section 288, subdivision (a) and constituted a violent felony; all combined constituted severe sexual abuse within the meaning of section 361.5, subdivision (b)(6).

Section 361.5, subdivision (b) reflects the Legislature’s desire to provide services to parents only where it will facilitate return of the child to a parent’s custody. (*In re A.M.* (2013) 217 Cal.App.4th 1067, 1074.) In light of father’s commission of sexual abuse; the criminal protective orders prohibiting any contact between father and the minors until October 2018; and the expressed fear of their father and desire not to reunify with him, the juvenile court had ample evidence upon which to deny reunification services to father.

DISPOSITION

The November 6, 2015 disposition order is affirmed.